ANTICIPATED ACQUISITION BY PROSAFE SE OF FLOATEL INTERNATIONAL LIMITED

Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups[1]

Introduction

1. On 17 September 2019, the Competition and Markets Authority (CMA), in exercise of its duty under section 33(1) of the Enterprise Act 2002 (the Act), referred the anticipated acquisition of Floatel International Limited (Floatel) by Prosafe SE (Prosafe) (the Merger), for further investigation and report by a group of CMA panel members (the Inquiry Group).

2. In its provisional findings on the reference notified to Prosafe and Floatel (the Parties) on 30 January 2020, the CMA, among other things, provisionally concluded that arrangements (that is, the Merger) are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation (RMS), and that the creation of that RMS may be expected to result in a substantial lessening of competition (SLC) the market for the supply of semi-submersible ASVs[2] in NW Europe,[3] including the United Kingdom.

3. The CMA's provisional findings are that this SLC may be expected to result in the following adverse effects: higher prices and/or reduced service quality and/or reduced product range.

4. This Notice sets out the actions which the CMA considers it might take for the purpose of remedying, mitigating or preventing the SLC[4] and/or any resulting adverse effects identified in the Provisional Findings Report.[5]

5. The CMA invites comments on possible remedies by 5pm on 6 February 2020.

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[1] CMA Rules of Procedure for Merger, Market and Special Reference Groups CMA17 March 2014, corrected November 2015 (CMA Rules).
[2] Accommodation Support Vessels.
[3] As defined in the provisional findings report.
[4] Elsewhere in this Notice, references to remedying the SLC are used as shorthand for the statutory reference to remedying, mitigating or preventing the SLC.
[5] See also sections 36(2) and 41 of the Act and rule 12.1 CMA Rules.

Criteria

6. In deciding on a remedy, the CMA shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLC and any adverse effects resulting from it.[6]

7. To this end, the CMA will seek remedies that are effective in addressing the SLC and its resulting adverse effects. In making this assessment, the CMA will consider:[7]

   (a) The impact which the remedy would have on the SLC and the resulting adverse effects;

   (b) The appropriate duration and timing of the remedy;

   (c) The practicality of the remedy; and

   (d) Whether the risk profile of the remedy is acceptable.

8. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.[8] In cases where more than one remedy is available, the CMA will select the least costly and intrusive remedy that it considers to be effective.[9]

Possible remedies on which views are sought

9. The CMA prefers structural remedies, such as divestiture or prohibition, over behavioural remedies, because:

   (a) structural remedies are more likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;

   (b) behavioural remedies are less likely to have an effective impact on the SLC and its resulting adverse effects, and are more likely to create significant costly distortions in market outcomes; and

   (c) structural remedies rarely require monitoring and enforcement once implemented.[10]

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[6] Section 36(3) of the Act.
[7] *Merger Remedies: CMA87* (December 2018), paragraph 3.5.
[8] *Merger Remedies: CMA87* (December 2018), paragraph 3.4.
[9] *Merger Remedies: CMA87* (December 2018), paragraph 3.4.
[10] *Merger Remedies: CMA87* (December 2018), paragraph 3.46.

10. The CMA's initial view is that the only structural remedy identified as being likely to be effective is prohibition of the Merger.

11. The CMA's emerging view is that a partial divestiture would require splitting up the Floatel (and/or Prosafe) business and selling particular assets which currently contribute to a single, integrated, competitive proposition to a suitable purchaser who would then need to compete effectively. This would be unlikely to comprehensively remedy the SLC or any resulting adverse effect identified in the Provisional Findings and accordingly our initial view is that this appears unlikely to represent an effective remedy.

12. As stated above, the CMA has a preference for structural remedies, and the circumstances of this case do not appear to represent one which would generally support reliance on behavioural remedies.[11] The CMA's initial view is that a behavioural remedy is very unlikely to be an effective remedy to the SLC or any resulting adverse effects identified in the Provisional Findings. However, the CMA will consider any behavioural remedies put forward as part of this consultation.

13. More generally, the CMA will consider any other practicable remedies that the Parties, or any interested third parties, may propose that could be effective in addressing the SLC and/or the resulting adverse effects.

14. In determining an appropriate remedy, the CMA will consider the extent to which different remedy options would be effective in remedying the SLC and/or any resulting adverse effects that have been provisionally identified.

15. The CMA will also consider whether a combination of measures is required to achieve a comprehensive solution – for example whether any behavioural remedies would be required in a supporting role to safeguard the effectiveness of any structural remedies. The CMA will evaluate the impact of any such combination of measures on the SLC and any resulting adverse effects.

Prohibition

16. Prohibition of the Merger would prevent an SLC from resulting in any relevant market. The CMA's initial view is therefore that a full prohibition would represent a comprehensive solution to all aspects of the SLC it has provisionally found (and consequently any resulting adverse effects) and that the risks in terms of its effectiveness are very low.

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[11] The circumstances in which behavioural remedies are more likely to be used as the primary source of remedial action are set out in *Merger Remedies: CMA87* (December 2018), paragraph 7.2.

Partial divestiture

17. In evaluating possible divestitures as a remedy to the provisional SLC it has found, the CMA will consider the likelihood of achieving a successful divestiture and the associated risks. In reaching its view, the CMA will have regard to the following critical elements of the design of divestiture remedies:

    (a) The scope of the divestiture package;

    (b) Identification of a suitable purchaser; and

    (c) The effectiveness of the divestiture process.[12]

18. These elements are discussed below.

The scope of the divestiture package

19. To be effective in remedying the provisional SLC, any divestiture package would need to be appropriately configured to be attractive to potential purchasers and to enable the purchaser to operate effectively as an independent competitor.[13]

20. In defining the scope of a divestiture package that will satisfactorily address the SLC, the CMA will normally seek to identify the smallest viable, stand-alone business that can compete successfully on an ongoing basis and that includes all the relevant operations pertinent to the area of competitive overlap.[14]

21. The CMA will generally prefer the divestiture of an existing business, which can compete effectively on a stand-alone basis, independently of the merger parties, to the divestiture of part of a business or a collection of assets. This is because divestiture of a complete business is less likely to be subject to purchaser and composition risk and can generally be achieved with greater speed.[15]

22. Prosafe and Floatel consist of a complementary set of integrated assets and capabilities which these companies have built up over a period of time,

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[12] *Merger Remedies: CMA87* (December 2018), paragraph 5.2.
[13] *Merger Remedies: CMA87* (December 2018), paragraph 5.3(a).
[14] *Merger Remedies: CMA87* (December 2018), paragraph 5.7.
[15] Purchaser risk refers to the risks that a suitable purchaser is not available or that the merger parties will dispose to a weak or otherwise inappropriate purchaser; composition risk refers to the risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market; *Merger Remedies: CMA87* (December 2018), paragraph 5.3 and 5.12.

providing them with economies of scale and scope. Together, all of these factors provide the Parties with their competitive propositions. Attempting to 'carve up' these businesses into individual assets to divest introduces particular risks that a purchaser will not be supplied with all it requires to operate competitively.[16]

23. We are not currently aware of any partial divestiture package which would provide a suitable purchaser with sufficient assets and capability to comprehensively remedy the SLC. Accordingly, the CMA's initial view is that partial divestiture is unlikely to represent an effective remedy.

24. The CMA invites views on whether a structural divestiture short of full prohibition would be effective, and if so:

(a) what would need to be included in any package of assets to be divested (eg number and identity of vessels, on-board and shore-based staff, safety / regulatory certifications, reputation / track-record, existing contracts, existing relationships, and other supporting services), and how this would be sufficient to comprehensively remedy the SLC and/or the resulting adverse effects;

(b) whether the Parties can divest a mixture of assets from both merger parties (sometimes referred to as a 'mix and match' approach), and whether such an approach would result in additional risks to the remedy;[17]

(c) whether there are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market;

(d) whether there are risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture – for example, through non- or under-use of any assets; and

(e) any other elements that may be required.

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[16] *Merger Remedies: CMA87* (December 2018), paragraph 5.14.
[17] The CMA has a preference for avoiding 'mix-and-match' remedies as this may create additional composition risk such that the divestiture package will not function effectively; *Merger Remedies: CMA87* (December 2018), paragraph 5.16.

Identification of a suitable purchaser

25. The identity and capability of a purchaser will be of major importance in ensuring the success of a divestiture remedy. The CMA will wish to be satisfied that a prospective purchaser:

    (a) is independent of the main parties;

    (b) has the necessary capability to compete;

    (c) is committed to competing in the relevant market; and

    (d) will not create further competition or regulatory concerns.[18]

26. To be effective, a partial divestiture would require a suitable purchaser to be identified which has the incentive, intention and capability to operate the vessel as an effective competitor in NW Europe. Given the lack of current suppliers active in NW Europe other than the Parties, it is not clear whether such an operator exists (eg see chapter 8 of the Provisional Findings).

27. The CMA invites views on whether there are any specific factors to which the CMA should pay particular regard in assessing purchaser suitability, eg:

    (a) whether there are risks that a suitable purchaser is not available or that the Parties will divest to a weak or otherwise inappropriate purchaser;

    (b) any necessary characteristics of a capable purchaser (eg if it needs to be currently active in the supply of semi-submersible ASVs in NW Europe or elsewhere);

    (c) whether purchasers are committed to retaining the acquired vessels and using them to compete in the supply of semi-submersible ASVs in NW Europe, particularly given the current levels of overcapacity and potential to scrap older / less profitable vessels;

    (d) whether purchasers are committed to continuing to compete in NW Europe, rather than relocating some or all of the relevant vessels; and

    (e) whether purchasers should have specific regulatory approvals in place.

Effectiveness of the divestiture process

28. An effective divestiture process will protect the competitive potential of any divestiture package before disposal and will enable a suitable purchaser to be

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[18] *Merger Remedies: CMA87* (December 2018), paragraphs 5.20 and 5.21.

secured in an acceptable timescale. The process should also allow prospective purchasers to make an appropriately informed acquisition decision.[19] The CMA invites views on the appropriate timescale for achieving a divestiture.

29. The CMA will consider what, if any, procedural safeguards may be required to minimise the risks associated with any divestiture.

30. At this stage, the CMA expects that it would be necessary to require an up-front buyer and that any divestiture is completed before the Merger would be allowed to complete.

31. The CMA invites views on whether Prosafe should be required to appoint a monitoring trustee to oversee the divestiture and to ensure that any package to be divested is maintained during the course of the process.

32. The CMA would have the power to mandate an independent divestiture trustee to dispose of any divestiture package if:

    (a) the Parties fail to procure divestiture to a suitable purchaser within the initial divestiture period; or

    (b) the CMA has reason to expect that the Parties will not procure divestiture to a suitable purchaser within the initial divestiture period.

33. In unusual cases, the CMA may require that a divestiture trustee is appointed at the outset of any divestiture process. The CMA invites views on whether the circumstances of this Merger necessitate such an approach in any divestiture process.

Cost of remedies and proportionality

34. In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, of those remedy options that it considers will be effective. The CMA will also seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. If the CMA is choosing between two remedies that it considers will be equally effective, it will choose that which imposes the least cost or that is the least restrictive.[20]

35. The CMA invites views on what costs are likely to arise in implementing any remedy option(s).

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[19] *Merger Remedies: CMA87* (December 2018), paragraph 5.33.
[20] *Merger Remedies: CMA87* (December 2018), paragraph 3.6.

Relevant customer benefits

36. In deciding the question of remedies, the CMA may have regard to the effects of any remedial action on any relevant customer benefits in relation to the creation of the RMS.[21]

37. Relevant customer benefits are limited by the Act to benefits to relevant customers[22] in the form of:

    (a) 'lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom […] or

    (b) greater innovation in relation to such goods or services.'[23]

38. For the purposes of an anticipated merger, the Act provides that a benefit is only a relevant customer benefit if:

    (a) it may be expected to accrue within a reasonable period as a result of the creation of the RMS; and

    (b) it is unlikely to accrue without the creation of that situation or a similar lessening of competition.[24]

39. The CMA welcomes views on the nature of any relevant customer benefits and on the scale and likelihood of such benefits and the extent (if any) to which these are affected by the different remedy options we are considering.

Next steps

40. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish the CMA to consider, by 5pm on 6 February 2020 (see Note (i)).

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[21] Section 36(4) of the Act, see also *Merger Remedies: CMA87* (December 2018), paragraphs 3.15 and 3.16.
[22] For these purposes, relevant customers are direct and indirect customers (including future customers) of the merger parties at any point in the chain of production and distribution and are therefore not limited to final consumers. See also section 30(4) of the Act.
[23] Section 30(1)(a) of the Act, see also *Merger Remedies: CMA87* (December 2018), paragraph 3.17.
[24] Section 30(3) of the Act, see also *Merger Remedies: CMA87* (December 2018), paragraph 3.19.

41. A copy of this notice will be posted on the CMA website.

Kirstin Baker
Inquiry Group Chair
29 January 2020

Note

(i) This notice of possible actions to remedy the SLC and/or any resulting adverse effects is made having regard to the Provisional Findings announced on 30 January 2020. Interested parties have until 5pm on 20 February 2020 to respond to the Provisional Findings. The CMA's findings may alter in response to comments it receives on its Provisional Findings, in which case the CMA may consider other possible remedies, if appropriate.